No. 88-1412

Supreme Court, U.S.
FILED
JUN 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

MARGARET J. RANDALL; NORMAN MAILER; ARTHUR MILLER; TONI MORRISON; ANNE NOGGLE; GRACE PALEY; PEN AMERICAN CENTER; ROSE STYRON; WILLIAM STYRON; HELENE VANN; KURT VONNEGUT; ALICE WALKER; DR. MARY MARTHA WEIGLE,

*Petitioners*,

—against—

RICHARD THORNBURGH, in his capacity as Attorney General of the United States; ALAN C. NELSON, in his capacity as Commissioner of the Immigration and Naturalization Service; A.H. GIUGNI, in his capacity as District Director of the Immigration and Naturalization Service, El Paso, Texas,

*Respondents*.

## PETITIONERS' REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 88-1412
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MARGARET RANDALL, et al.,

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v.

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PETITIONERS' REPLY IN SUPPORT
OF A WRIT OF CERTIORARI

This reply responds briefly to several contentions advanced in respondents' opposition to the petition for a writ of certiorari.

1. Respondents' opposition rests on two related propositions. First, respondents argue that the jurisdictional conflict pointed to in the petition is illusory because the court of appeals' decision is simply a "prudential" holding

that petitioners' claims are premature. Opp. 9-18. Second, they assert that because the court of appeals did not deny but only deferred review of petitioners' claims, no constitutional problems are raised by the court's refusal to entertain petitioners' substantial constitutional claims. Opp. 19.

Both propositions share the same flaw: the court of appeals' "prudential" holding that the case is premature is premised upon its determination that review is available later under 8 U.S.C. §1105a.[1] And because that jurisdictional construction is erroneous, the court's

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[1] Pet. App. 30a (Randall's "substantive pleas [are] untouched, it is true, but [they are] still open for judicial review at a later time -- when a final order has been made by the Board of Immigration Appeals -- and in another place -- in the judicial circuit in which the El Paso district director and immigration judge proceeded, or the judicial circuit in which Randall resides. See 8 U.S.C. §1105a(a)(2).").

decision both creates a conflict with the holdings of this Court and other courts of appeals, and denies petitioners any review of the district director's patently unconstitutional action.[2]

It is not surprising that respondents make no attempt to defend the court of appeals' jurisdictional interpretation of Section 1105a, for it is contrary to the construction advocated

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[2]The disingenuousness of respondents' argument is demonstrated by their own words. They first claim that the Court's decision was not based "on novel jurisdictional theories under 8 U.S.C. §1105a, but on the prudential factors involved in the appropriate timing of judicial review," Opp. 9, and that "without construing Section 1105a, the Court also determined that the relief petitioner seeks could be requested in later proceedings." Id. at 10. These are non sequiturs, for the only way to determine whether relief "could be requested in later proceedings" is precisely by "construing Section 1105a." Respondents effectively admit this later, when they state that "the court of appeals expressed its view that in a later judicial proceeding under Section 1105a, petitioner could seek to have her status adjusted retroactively." Id. at 11.

by the INS itself in other cases. Pet. 32-33.

2. Respondents suggest in passing that petitioners' claims might be reviewable under Section 1105a under "pendent jurisdiction." Opp. 14-15 and n.12.[3] But the cases respondents cite make clear that petitioners' challenge to the district director's decision would not be appropriate for pendent jurisdiction.[4] In each case, the courts

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[3]The court of appeals never mentioned pendent jurisdiction.

[4]Olaniyan v. District Director, INS, 796 F.2d 373, 376 (10th Cir. 1986); Mohammadi-Motlagh v. INS, 727 F.2d 1450 (9th Cir. 1984); Tooloee v. INS, 722 F.2d 1434 (9th Cir. 1983); Ghorbani v. INS, 686 F.2d 784 (9th Cir. 1982). Indeed, given the procedural parallel between petitioners' claim and the claim in Cheng Fan Kwok v. INS, 392 U.S. 206 (1968), see Pet. 29-30 and n.9, if pendent jurisdiction were appropriate here, it would have been appropriate in Cheng Fan Kwok. Yet while the Cheng Fan Kwok Court mentioned pendent jurisdiction, it held that the court of appeals lacked jurisdiction to hear Cheng Fan

rejected pendent jurisdiction when faced, as here, with a challenge to a district director's discretionary decision rendered prior to deportation proceedings. See also Wall v. INS, 722 F.2d 1442, 1443-44 (9th Cir. 1984).[5]

3. Respondents further assert that granting review at this point would interfere with ongoing deportation proceedings. This argument is a red herring. First, petitioners filed their

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Kwok's claim.

[5]Pendent jurisdiction is appropriate in only two instances: "when there has been a factual hearing on the issue, equivalent to that required by section 242(b) [8 U.S.C. §1252(b)], or when such a hearing is unnecessary." Ghorbani, 686 F.2d at 790. Here, as in Ghorbani, Tooloee, Mohammadi-Motlagh, Wall, and Olaniyan, no factual hearing was held, and a hearing is necessary to review the record of the district director's decision. In addition, petitioners claimed that the district director's decision was part of a pattern and practice of using the immigration laws to curb dissent, which clearly requires a hearing. Pet. App. 97a.

suit not "in the midst of ongoing deportation proceedings," Opp. 16, but before any deportation proceedings were instituted. Second, the deportation proceedings would not be "ongoing" but for the allegedly unconstitutional decision of the district director to deny Ms. Randall permanent resident status in the first place. To hold that a court should defer to proceedings instituted by the defendant after suit is filed, and that could not have been instituted absent the allegedly unconstitutional action under review, would grant district directors carte blanche to violate the Constitution without review.[6]

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[6]Respondents also point to the fact that, in the deportation proceeding that should never have been instituted had the district director considered her application within constitutional limits, an immigration judge has found Ms. Randall statutorily ineligible for adjustment of status because of the content of her writings.

4. Finally, respondents belittle Ms. Randall's harm, stating that "[a]t most the decision of the court of appeals here could affect the dates on which the peititioner would be granted such adjustment [of status] and thereafter become eligible for naturalization." Opp. 11-12. Even if this were the only effect of the court of appeals' decision, this Court has twice found such a delay in eligibility for naturalization to be cognizable harm. Pet. 22 n.6.

Moreover, this is not the only harm Ms. Randall suffers. Since October 1985, when the District Director denied her application for permanent resident

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Opp. 10-11. Even if the deportation proceedings were not void ab initio, this determination would not be binding on the district director, because administrative determinations on admissibility have no res judicata effect. Matter of Bark, 14 I&N Dec. 237 (BIA 1972); Talavera v. Pederson, 334 F.2d 52, 57 (6th Cir. 1964).

status, Ms. Randall has lived in a sort of limbo, without legal status, solely because a government official disapproved of the political content of her writings. The INS has denied Ms. Randall authorization to work while she remains here. And she is unable to travel abroad even for a day, for to do so would be considered a concession that she is deported. 8 C.F.R. §245.2(a)(3)(1986). As a professor and writer who specializes in oral history of Latin American peoples, this restriction severely hampers her ability to pursue her profession. The restriction also bars her from visiting her children and grandchildren who live abroad.

## CONCLUSION

The court of appeals relegated Ms. Randall to a non-existent remedy for a substantial constitutional claim. Its contention that it was only deferring, not denying, Ms. Randall's claim, rests on a jurisdictional construction of 8 U.S.C. §1105a contrary to the holdings of every other court to address the matter. If Ms. Randall deserves a remedy for adverse governmental action resting expressly on the political content of her writings, she can obtain that remedy only in this proceeding. This Court should therefore grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: June 6, 1989